Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-265
	)	
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

REPLY OF TIME WARNER ENTERTAINMENT COMPANY, L.P., TO OPPOSITIONS TO ITS PETITION FOR RECONSIDERATION

July 26, 1993

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Preliminary Statement

Several parties who participated in this rulemaking proceeding, including Time Warner Entertainment Company, L.P. ("TWE"), filed Petitions for Reconsideration or Clarification of the Commission's First Report and Order ("the Order"), Cable Act of 1992--Program Distribution and Carriage Agreements, 58 Fed. Reg. 27,658 (May 11, 1993). TWE hereby replies to oppositions to its Petition for Reconsideration.[1]

Argument

I. A SHOWING OF VERTICAL INTEGRATION IN THE SPECIFIC AREA AT ISSUE SHOULD BE AN ELEMENT OF A PROGRAM-ACCESS COMPLAINT.

In its Petition for Reconsideration, TWE argued that a showing of vertical integration in the specific area at issue should be an element of a program-access complaint. TWE argued that one can understand how, at least in theory, a programming vendor might have an incentive to discriminate against a competitor of a cable operator in which it has an interest. TWE

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[1]The parties opposing TWE's Petition for Reconsideration (and to which TWE hereby responds) include Bell Atlantic Co. ("Bell Atlantic"), GTE Service Corporation ("GTE"), Wireless Cable Association International, Inc. ("WCA"), Liberty Cable Company, Inc. ("Liberty Cable"), DirecTV, Inc. ("DirecTV") and Consumer Satellite Systems, Inc. ("CSS").

TWE notes that Liberty Cable has again submitted with its filing a letter complaining of purported unfair practices by TWE in connection with Court TV in New York. See June 17, 1993, Letter to the Attorney General of New York. As TWE has previously noted in this rulemaking, the New York City Department of Telecommunications has repeatedly rejected similar complaints by Liberty Cable in the past. See TWE Reply Comments Appendix 1 and Exhibits 1 and 2.

Pet. 8. Thus, one can at least argue that there is a rational basis for a rule that prevents a vertically integrated programming vendor from acting on that incentive. TWE further noted that one might also be able to understand how, in theory, a programming vendor might have an incentive to discriminate in favor of a cable operator in which it does not hold an interest, in that cable operators are generally programming vendors' best customers. Id.[2] However, TWE pointed out that there is no rational basis for adopting a rule that prevents only vertically integrated programming vendors from acting on this second incentive, because independent programming vendors have this second incentive to the same extent as vertically integrated programming vendors. Id. at 8-9. Accordingly, TWE argued, the Order is unlawful. Id. at 9-10. Because--in the face of comments urging a contrary rule--the Commission did not adequately explain why vertically integrated programming vendors should be treated more harshly than independent programming vendors, the Order is arbitrary and capricious. And, because the Order did not identify a sufficiently weighty governmental interest that would in any way be furthered by distinguishing between vertically integrated and independent programming vendors, the Order violates equal-protection principles.

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[2]On the other hand, of course, any programming vendor also has a countervailing incentive: to distribute its programming to as wide an audience as possible. And, at least in the case of TWE, the evidence is clear that this countervailing incentive usually prevails. See, e.g., TWE Pet. 3.

Oppositions to TWE's request for reconsideration bring two arguments to bear. First, some parties argue that the statute required the rule that the Commission adopted, and does not permit TWE's reading. See Bell Atlantic 8; DirecTV 8; WCA 5. Second, some parties argue that vertically integrated programming vendors have stronger incentives to discriminate in favor of cable operators in which they hold no interest than do independent programming vendors. See Liberty Cable 4; WCA 6. Neither argument is persuasive.

First, the Commission has never tried to justify its rule by arguing that it has no authority to adopt the rule advocated by TWE. To the contrary, the Commission has specifically asked whether the prohibitions of § 19 should be limited to areas "where an entity is in fact vertically integrated". See Notice of Proposed Rulemaking ¶ 11. Thus, the Commission has squarely recognized that it has the authority to adopt TWE's rule. And, as TWE showed in its Comments, TWE Comments 6-7 and n.5, the Commission was correct in doing so.[3]

Second, WCA argues that "by denying program access to a non-cable MVPD, the vertically integrated programmer can weaken that MVPD's ability to compete not only in that particular market, but also in markets where the programmer's cable affiliates operate, by diminishing that MVPD's economies of

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[3]Although TWE does not agree that the statute required the rule promulgated by the Commission, if it does, the statute itself violates equal protection, as well as the First Amendment.

scale". WCA 6; see also Liberty Cable 4. This, of course, is not an argument that the Commission has ever stated in support for its rule. In any event, the argument fails on the merits. The argument apparently assumes that a programming vendor that is vertically integrated with a cable operator in, say, Maine, that competes with an MMDS operator there, might discriminate against that same MMDS operator in, say, California--even though the programming vendor has no interest in any cable operators there--to make the MMDS operator a less effective competitor in Maine. It is unlikely, to say the least, that, even in theory, such an attenuated and watered-down incentive could ever influence a programming vendor's conduct, because any such incentive is easily outweighed by the programming vendor's incentive to sell as much of its product as possible. Further, there is nothing in the record before the Commission to suggest that such scenarios are a reality. None of the parties opposing TWE's Petition for Reconsideration points to any example of an alternative-technology distributor being discriminated against in area B by a cable programming vendor that is vertically integrated with a cable operator competing with that same alternative-technology distributor in area A.[4]

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[4]With "remarkable bravado", WCA offers three additional arguments that are even weaker. Its argument that "a vertically integrated programmer has a strong incentive to refuse to deal with MVPDs serving areas unserved by cable in order to protect its affiliates' ability to provide service in the future to consumers in those areas through an alternative technology, such
(continued...)

II. THE COMMISSION'S DISCRIMINATION RULES SHOULD NOT APPLY TO EXISTING CONTRACTS.

[redacted]

terms of an agreement--entirely lawful when entered--that might predate passage of the Act by years. The Commission's rule is all the more unreasonable because the Commission had several alternatives available that would not have had the punitive effects of its current rule.[5]

This rule has a severe and unreasonable impact upon programming vendors. For example, a programming vendor that, upon launch, entered into a long-term affiliation agreement at a low price as an inducement to obtain carriage is deprived of the ability to capitalize upon increased demand for its product as an established service (when it can obtain carriage at a higher price).[6] The Order apparently does not view this as bad policy, contemplating that the parties to the earlier contract will renegotiate the terms of carriage. Order ¶ 122. However, there is no reason why the distributor receiving programming on favorable terms will voluntarily give up those terms. Accordingly, the rule should be reconsidered.[7]

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[5]For example, the Commission could have adopted the rule suggested by TWE that these proscriptions should apply to future contracting only. TWE Comments 33-35; TWE Reply Comments 16-17.

[6]The Order does indicate, however, that vendors may establish the legitimacy of price differentials based on a variety of factors related to offering of service. See Order ¶ 111; see also § 76.1002(b) note 2.

[7]See Bowen v. Georgetown University Hospital, 488 U.S. 216, 220 (1988) (Scalia, J., concurring) ("A rule that has unreasonable secondary retroactivity . . . may for that reason be 'arbitrary and capricious' and thus invalid.") (citations omitted); Boise-Kuna Irrigation District v. FERC, 1993 WL 179498,

(continued...)

DirecTV appears to argue that TWE, knowing of complaints about purported discrimination, should have anticipated the Commission's rule, and therefore entered into long-term agreements at its peril. See DirecTV 8. This argument must be rejected. First, if unduly burdensome regulation could be justified on the ground that regulated entities should have expected such regulation, judicial review of agency action would in effect be eliminated.[8] Second, even if programming vendors could have foreseen regulation of some kind, that does not necessarily mean that they could have foreseen the harsh--indeed, punitive--regime that the Commission has now adopted, especially in light of the many more sensible alternatives available.[9]

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[7](...continued)
*4 (D.C. Cir. June 1, 1993) (to be reported at 994 F.2d 1)(regulations that have sufficient effect upon the future consequences of past transactions may be arbitrary and capricious).

TWE submits that the statute, and the Commission's rule interpreting it, also contravene due process principles by substantially impairing its private contractual rights in an arbitrary and capricious way. See National RR Passenger Corp. v. Atchison, Topeka and Sante Fe Ry. Co., 470 U.S. 451, 472 (1985).

[8]Cf. Colorado Springs Prod. Credit Ass'n v. Farm Credit Admin., 967 F.2d 648, 655 n.8 (D.C. Cir. 1992) ("In this era of pervasive regulation . . . almost any entity could be said to have a reasonable expectation of governmental intrusion".).

[9]See supra n.7.

III. ONLY EXCLUSIVE SUBDISTRIBUTION ARRANGEMENTS SHOULD BE REGULATED.

In its Petition, TWE asked the Commission to clarify that § 76.1002(c)(3) applies only to exclusive subdistribution arrangements. No party has opposed this request. Accordingly, TWE submits that all parties are in agreement that the Commission should clarify its rules in the manner requested.

Conclusion

For the foregoing reasons, TWE's Petition for Reconsideration should be granted.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have this 26th day of July, 1993, caused a copy of the foregoing "Reply of Time Warner Entertainment Company, L.P., To Oppositions To Its Petition For Reconsideration" to be served by first-class mail on the following:

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